

# Holland & Knight

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## **VIA HAND DELIVERY**

Marlene H. Dortch, Esq., Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

***Attn: Disability Rights Office,  
Consumer & Governmental Affairs Bureau***

Re: Informal Complaint of Elizabeth McCarthy  
FCC Complaint No. 11-C0034302-FC

Dear Ms. Dortch:

On behalf of WHDH-TV, the licensee of WHDH, Boston, Massachusetts (the "Licensee"), this letter responds to the above-referenced informal complaint submitted to the Commission by Elizabeth McCarthy using electronic Form 2000C – Disability Access Complaint (the "Complaint"). Through a *Notice of Informal Complaint* dated October 11, 2011, the Commission informed WHDH of the Complaint. On October 12, 2011, WHDH's counsel sent a letter to Ms. McCarthy acknowledging receipt of the *Notice* and Complaint. Attached hereto is the supporting declaration of Christian Wayland, General Manager of the Licensee.

In the Complaint, Ms. McCarthy alleged that, on "06/02/2011 19:50:00:PM," "Governor Patrick was holding an emergency press conference to address the tornado damage earlier in the evening. None of the broadcast was captioned on this channel." Contrary to that statement, on June 2, 2011, Massachusetts did not experience any tornadoes. However, on June 1, 2011, WHDH broadcast extensive weather coverage, including a press conference at the time noted by Ms. McCarthy. Therefore, this response addresses WHDH's programming aired on June 1, 2011 based on the assumption that Ms. McCarthy inadvertently noted June 2 in her complaint rather than June 1.

Submitted with this response is a DVD recording of WHDH's programming from June 1, 2011, beginning at 7:30 p.m. As detailed below, although the programming that aired on WHDH from approximately 7:30 p.m. until 8:00 p.m. lacked closed captioning due to technical difficulties experienced by WHDH's closed captioning provider, WHDH provided multiple other methods of visual presentation. Therefore, although WHDH regrets that it could not provide captions to its viewers during this specific period, despite its best efforts to do so, it nevertheless complied with Section 79.2 of the Commission's rules regarding making emergency information accessible to persons who are deaf or hard of hearing.

### Factual Background

On June 1, 2011, the Licensee provided 7.5 hours of weather coverage in order to ensure that its viewers were fully informed about severe weather moving across Massachusetts. The coverage began at 4:00 p.m. on WHDH, and continued on WHDH until 8:00 p.m., at which time it moved to sister-station WLVI until 11:00 p.m., when the weather coverage moved back to WHDH until 11:30 p.m. Other than the period from approximately 7:30 p.m. to 8:00 p.m., all of this weather coverage was fully captioned. In other words, more than 93% of the weather coverage was captioned.

The live captioning being provided to WHDH was disrupted when its captioning service changed operators at 7:30 p.m. Specifically, at 7:30, after the captioner that had been remotely captioning since 7:00 p.m. logged off/disconnected, the new captioner failed to properly connect to WHDH. The captioner did not realize that the captions were not being transmitted to WHDH, so she continued to caption the programming rather than independently attempting to re-connect or otherwise remedy the technical difficulties. WHDH personnel quickly, in a matter of a few minutes, became aware of the lack of captioning, at which time they called the captioning service's help line. Stations cannot directly contact a particular captioner, so they must rely on this general help line.

Unfortunately, when WHDH personnel called this number, there was no answer, so they were transferred to a voicemail system. They did not leave a message because, in the past, it had taken the captioning service too long to respond to a voicemail. Accordingly, rather than leave a message and passively await a response, WHDH personnel instead called back several times until they finally reached a customer service representative at 7:46 p.m. The customer service representative then contacted the remote captioner, who logged off and attempted to dial back in. Once WHDH personnel realized that the issue was not being properly remedied because captioning still had not returned, they again called the captioning service's customer service help line at 7:54 p.m. A customer service representative again contacted the captioner, who again logged off, rebooted her equipment, and dialed back in. At this point, it appeared as if the captioner had finally established a proper connection with WHDH.<sup>1</sup> However, by that time, the captioner's scheduled 30-minute shift was ending. At 8:00 p.m., once a new captioner dialed in, WHDH's programming was again fully captioned. During and after these closed captioning difficulties, WHDH checked its own equipment, which was working properly. Moreover, because the captioners connected to WHDH both before and after this timeframe had no problems providing closed captioning, WHDH is confident that the technical difficulties were due to the individual captioner's equipment, not WHDH's equipment.

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<sup>1</sup> The Licensee notes that it does not have first-hand knowledge of the conversations between the customer service representative and the remote captioner or the actions the captioner took in order to attempt to properly connect to WHDH. This portion of the factual summary is based on subsequent descriptions in correspondence to WHDH from the captioning service.

The Lack of Captioning Was *De Minimis* and Reasonable

Although WHDH generally is obligated to caption all new, nonexempt programming,<sup>2</sup> a *de minimis* or reasonable failure such as this does not constitute a violation of the closed captioning rule.<sup>3</sup> Despite its best efforts and due to circumstances beyond its control, WHDH could not immediately correct the lapse in captioning during this weather coverage. As noted, although WHDH personnel noticed the lack of captioning almost immediately, they lacked the capability to restore or provide captioning on their own. Moreover, time passed because they were unable to reach the captioning service's customer service office despite multiple calls to the designated help line, and they had no way to directly contact the off-site captioner who unknowingly was experiencing technical difficulties that prevented her from connecting to WHDH, and thereby caption WHDH's programming. Further, even once WHDH was able to relay a message to the captioner through the service's customer service representative, the first attempt to correct the problem proved unsuccessful. WHDH was forced again to contact the customer service representative who assisted the remote captioner in taking several corrective steps which eventually allowed the captioner to connect to WHDH, but not before nearly thirty minutes had passed since the captioning was first interrupted. Also as noted, these technical difficulties did not involve WHDH's equipment, but rather the equipment of the individual off-site captioner, so WHDH could not take corrective actions itself. The lapse in captioning therefore was reasonable, and, as a result, did not violate Section 79.1 of the Commission's rules. Moreover, WHDH clearly made good faith efforts to reinstate closed captioning within a reasonable period of time, which is all the Commission requires in a situation such as this.<sup>4</sup>

WHDH Complied with Section 79.2 of the Commission's Rules by Providing Other Methods of Visual Presentation

Section 79.2 of the Commission's rules requires that emergency information provided in the audio portion of programming be made accessible to persons with hearing disabilities by visually presenting the "critical details" of the emergency information broadcast. Stations may fully comply with §79.2 either through closed captioning or other methods of visual presentation, such as open captioning, crawls, or scrolls.<sup>5</sup> Other acceptable methods of visual presentation

<sup>2</sup> See 47 C.F.R. §79.1(b)(1)(iv).

<sup>3</sup> See 47 C.F.R. §79.1(e)(10); *Clarification of Obligation of Video Programming Distributors to Make Emergency Information Accessible to Persons with Hearing Disabilities Using Closed Captioning*, Public Notice, 21 FCC Rcd 9066, 9066-67 (2006) ("Clarification PN").

<sup>4</sup> See *Clarification PN*, 21 FCC Rcd at 9067.

<sup>5</sup> See 47 C.F.R. §79.2(b)(1)(i); *Reminder Regarding Video Programming Distributors' Obligation to Make Emergency Information Accessible to Persons with Hearing Disabilities*, Public Notice, DA 11-1070, p. 2 (June 17, 2011); *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Acts of 1996, and Accessibility of Emergency Programming*, Second Report and Order, 15 FCC Rcd 6615, 6618 & 6620-21 (2000) ("Second R&O").

include maps, signs, and charts.<sup>6</sup> In other words, Section 79.2 does not require closed captioning.<sup>7</sup> As detailed below, throughout the approximately thirty minutes of programming relevant here, WHDH provided significant and varying forms of visual presentation.

Starting at 7:30:54 p.m., less than one minute after the captioning ceased due to the captioner's equipment failure, WHDH's programming contained a banner across the bottom of the screen notifying viewers that there was a "Current Tornado Warning in Northern and Southern Worcester County." Because WHDH did not take commercial breaks in order to ensure its viewers were constantly receiving up-to-date information, this banner remained on-screen at all times until after WHDH began airing the Governor's press conference at 7:51:30 p.m. Specifically, this banner remained on-screen until 7:53:30 p.m., when it was replaced with a banner informing viewers of the Governor's announcement that there was a "State of Emergency Declared in Massachusetts." Approximately 1.5 minutes later, the banner information changed to "Gov. Patrick: Report of One Storm-Related Fatality." Thereafter, at approximately 30-second intervals, the on-screen banner switched between these three pieces of information until the Licensee's weather coverage switched to WHDH's sister-station, at which time a new off-site captioner connected to WHDH and full captioning was restored. Significantly, all of the "emergency information" broadcast by WHDH concerned locations in Northern and Southern Worcester County, and at all times during the broadcast of this information the "Current Tornado Warning in Northern and Southern Worcester County" banner remained on-screen.

In addition, at 7:30:31 p.m., WHDH displayed a graphic box entitled "Tornado Safety" that included three safety tips, including "Basement or Interior Room," "Lowest Floor Away from Windows," and "Stay Away from Loose Objects." At 7:30:45 p.m., the programming began to consist of WHDH's meteorologist standing in front of a full-screen radar map. Significantly, at all times while WHDH was providing emergency information, the programming included a full-screen map which visually displayed extensive details about the weather event. In total during the 30-minute period when the captioner's equipment was faulty, WHDH broadcast nine minutes and 37 seconds of programming that included full-screen maps visually informing viewers of the potentially dangerous weather conditions. WHDH again notes that the

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<sup>6</sup> See *Obligation of Video Programming Distributors to Make Emergency Information Accessible to Persons with Hearing Disabilities Using Closed Captioning*, Public Notice, DA 06-2627, p. 3 (Dec. 29, 2006) ("2006 PN"); *McGraw-Hill Broadcasting Co., Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3981, 3983 (2005).

<sup>7</sup> See *Second R&O*, 15 FCC Rcd at 6620-21 (2000); *Clarification PN*, 21 FCC Rcd at 9066-67 (clarifying that, despite the implementation of the 100% closed captioning benchmark, "in evaluating whether a video programmer has complied with [the] closed captioning rules, [the Commission] will not consider any lack of captioning that results from a de minimis or reasonable failure to caption emergency information, so long as critical emergency information is provided through some method of visual presentation.")

Commission has expressly recognized that maps are an acceptable form of visual presentation and may be relied upon for Section 79.2 compliance purposes.<sup>8</sup>

Moreover, these varying full-screen maps provided information in addition to the radar images. For instance, most of the full-screen radar maps contained depictions of lightning bolts in those areas where WHDH had learned there were active lightning storms. In addition, at 7:31:03 p.m., WHDH added a graphic to the radar map to visually depict the likely path of the storm. At 7:42:19 p.m., WHDH broadcast a full-screen map indicating the wind speed and direction in several locations. At 7:45:10 p.m., WHDH switched to a color-coded map that consisted of a "Weather Watches – Warnings" graphic. The areas of the map under weather watches were colored yellow, while the areas under weather warnings were red.

WHDH also super-imposed additional information on top of these full-screen maps. For instance, at 7:31:09 p.m., WHDH included a graphic box entitled "Storm Track" which listed the number of minutes until the storm was expected to arrive in five different locations. Starting at 7:45:10 p.m., WHDH broadcast two other graphic boxes. One was entitled "Tornado Warning," and informed viewers that the warning had been in effect for Middlesex and Worcester Counties until 7:44 p.m. The other, entitled "Severe Thunderstorm Warning," informed viewers that the warning would be in effect for Litchfield until 8:15 p.m.

During the rest of the approximately thirty-minute period of time relevant here, WHDH was not broadcasting "emergency information." Specifically, from 7:32:52 p.m. to 7:40:07 p.m., its coverage consisted entirely of reports of storms and the effects thereof that had occurred earlier in the day in the towns of Springfield, Sturbridge, and Leicester.<sup>9</sup> The video portion of this coverage consisted almost entirely of viewer videos and pictures taken earlier in the day in these cities. Nearly identical coverage of these earlier events again was broadcast from 7:47:37 p.m. to 7:51:30 p.m., at which time WHDH switched to coverage of the Governor's press conference, which lasted until 8:00 p.m.

These portions of WHDH's weather coverage did not constitute "emergency information" because they concerned past events. Section 79.2 defines "emergency information" as "[i]nformation, about a *current emergency*, that is intended to further the protection of life, health, safety, and property, *i.e.*, critical details regarding the emergency and how to respond to the emergency."<sup>10</sup> WHDH's news personnel were simply discussing past events, including the particular scenes displayed in pictures and videos submitted by its viewers. These discussions about past events were not "intended to further the protection of life, health, safety, and property" of WHDH's viewers, so they did not constitute "emergency information," and therefore did not fall within the scope of Section 79.2. Moreover, even during these periods,

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<sup>8</sup> See 2006 PN, DA 06-2627, p. 3.

<sup>9</sup> WHDH notes that in addition to the fact that the storms had already occurred in these areas, Springfield is outside of WHDH's service area.

<sup>10</sup> 47 C.F.R. §79.2(a)(2) (emphasis added).

WHDH continued to visually present emergency information to its viewers through the banners detailed above.

Accordingly, as soon as the lapse in captioning began, WHDH began to provide thorough and sufficient methods of visual presentation for all of the emergency information it broadcast. WHDH's actions therefore contrast significantly to those instances where the Commission has found accessibility violations – *i.e.*, where stations completely failed to provide visual depictions of emergency information for substantial periods of time.<sup>11</sup> WHDH thus complied with §79.2, particularly because the Commission permits video programmers to rely on their own good faith judgments in determining whether particular details need to be made accessible.<sup>12</sup>

#### WHDH's Subsequent Remedial Measures to Ensure Full Accessibility

WHDH takes its obligation to fully inform all viewers, including those who are deaf or hard of hearing, of all severe weather events and other potentially dangerous situations. This dedication is evidenced by the Licensee's substantial coverage, lasting a full 7.5 hours on WHDH and its sister-station, of the severe weather that occurred on June 1, 2011. WHDH therefore deeply regrets that technical difficulties beyond its control disrupted full captioning for a short portion of its June 1 coverage, even though the lack of captioning was due to circumstances beyond its control. As a result, WHDH undertook several measures after that time to ensure that a similar situation will not occur again.

On June 1, WHDH was using an Evertz VIP monitoring solution with "Loss of Captioning" alarms. This alarm is set to go off when captioning has been missing for more than 2.5 minutes.<sup>13</sup> During its investigation into the lapse in captioning on June 1, WHDH learned that the Evertz VIP alarm will not sound if a captioner is logged in, even if the captioner is not properly connected and thus not actually captioning the programming. More specifically, when a captioner logs into WHDH's encoder, a "header" is generated. The Evertz VIP recognizes this header and believes WHDH has captioning. This occurred on June 1. Luckily, on that day, WHDH personnel quickly noticed the lack of captioning even without the alarm. However, as an added precaution, WHDH has since purchased a second loss of captioning alarm manufactured by EEG. This alarm looks for active captioning, not simply a header. In addition,

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<sup>11</sup> See, e.g., *ACC Licensee, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 9832 (2005) (liability for failure to provide visual presentation for 2.5 hours); *McGraw-Hill*, 20 FCC Rcd 3981 (liability only with respect to those instances where visual presentation delayed "at least 30 minutes"); *Midwest Television, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3959 (2005) (liability only with respect to those instances where visual presentation delayed "at least 30 minutes"); *Channel 51 of San Diego, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3969 (2005) (liability only with respect to those instances where visual presentation delayed "at least 30 minutes").

<sup>12</sup> See *Second R&O*, 15 FCC Rcd at 6617.

<sup>13</sup> The alarm is set for 2.5 minutes because many commercial breaks, for which captioning is not required, last up to 2 or 2.25 minutes in length.

WHDH has instituted a new standard operating protocol for its photographers in the field. Specifically, whenever the Governor provides emergency information during which someone providing sign language stands next to the Governor, the photographers stay "wide" in order to also include the person providing sign language in the shot.

### Conclusion

If the Commission finds an accessibility violation despite WHDH's various other methods of visual presentation provided without any advance notice that its captioner would experience technical difficulties, the Commission could deter emergency broadcasts. WHDH, pursuant to the good faith discretion granted to it by the Commission, determined that it would continue informing its viewers of the severe weather occurring in Massachusetts, even though it could not provide closed captioning at that particular moment.<sup>14</sup> Television licensees, including WHDH, are under no specific statutory or regulatory obligation to provide the kinds of weather coverage that are the subject of the Complaint.<sup>15</sup> Failing to dismiss the Complaint promptly, or imposing sanctions, under these circumstances could chill the willingness of licensees in the future to provide timely weather coverage, possibly leading them to achieve "compliance" by foregoing all coverage of emergency conditions if captioning fails for any reason.

Based on the foregoing, WHDH respectfully requests that the Commission dismiss the Complaint. In the event that there are questions concerning this matter, please communicate with the undersigned.

Very truly yours,



Charles R. Naftalin  
Leighton T. Brown  
*Counsel to WHDH-TV*

cc: Elizabeth McCarthy (*via U.S. Mail*)  
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Boston, MA 02113

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<sup>14</sup> See *Clarification PN*, 21 FCC Rcd at 9066 ("[W]e should not place video programmers in a position where they are forced to choose between broadcasting emergency information and violating our closed captioning rules or failing to provide their viewers with vital emergency information.").

<sup>15</sup> See *Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing Disabilities*, Public Notice, 16 FCC Rcd 15348, 15352 (2001) ("The rule does not require any entity to provide emergency information.").

## DECLARATION OF CHRISTIAN WAYLAND

I, Christian Wayland, declare the following.

I am more than 18 years of age, am competent to testify, and I understand my obligation to tell the truth.

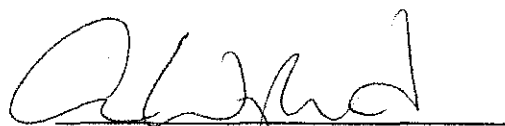
I am the General Manager of WHDH-TV, the licensee of WHDH, Boston, Massachusetts. I have been the General Manager of WHDH-TV since November 3, 2008.

I have read a copy of the informal complaint of Elizabeth McCarthy submitted to the Federal Communications Commission ("FCC") as provided by an FCC notice dated October 11, 2011. I am familiar with the circumstances of WHDH programming that appears to be the subject of Ms. McCarthy's complaint.

I participated in the preparation of the November 10, 2011 WHDH response to Ms. McCarthy's complaint, including by reading and approving of a materially complete final draft of it. Except with respect to matters of public record, or for which the FCC may take official notice, the assertions of fact in WHDH's response are correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

November 7, 2011

  
Christian Wayland